STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2014
v DONOVAN YOUNG, Defendant-Appellant.	No. 310435 Wayne Circuit Court LC No. 11-012797-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEVIN AUGUSTUS CRAIG, Defendant-Appellant.	No. 311045 Wayne Circuit Court LC No. 11-010905-FC

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendants Donovan Young and Kevin Craig were tried jointly, before a single jury. The jury convicted both defendants of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant Craig as a third-habitual offender, MCL 769.11, to life imprisonment for the murder conviction and a concurrent prison term of 40 to 80 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. The court sentenced defendant Young to life imprisonment for the murder conviction and a concurrent prison term of 20 to 40 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Young appeals as of right in Docket No. 310435, and defendant Craig appeals as of right in Docket No. 311045. We affirm in both appeals.

Defendants' convictions arise from the shooting death of Antonio Turner and nonfatal gunshot injuries to Darneil Richardson on June 12, 2011, on Sorrento Street in Detroit.

Richardson and defendant Craig were rival drug dealers. Richardson testified that he encountered defendant Craig on the street and the two became involved in an argument. Turner and defendant Young also were present. According to Richardson, defendant Young pointed a .357 caliber revolver at Turner's face, said "f**k it," and pulled the trigger, but the revolver did not discharge. Richardson then observed defendant Craig also pull out a gun. Richardson and Turner both ran off. As Richardson was running, he heard gunshots and was shot in the leg. Turner was shot three times and died at the scene.

A witness, Barbara Ingram, testified that she saw defendant Craig and another man both pull out guns, which were pointed at Turner. After Turner put his hands up in the air, shooting started. Ingram briefly ducked for cover, but then looked up again and saw Turner on the ground. Defendant Craig had left, but then returned and shot Turner. Another witness, Ariel Sydes, testified that she heard a gunshot, looked outside, and saw defendant Craig, who was armed with a gun, chasing Richardson. Turner was lying in the middle of the street. Neither defendant testified at trial. Both defendants attacked the credibility of the prosecution witnesses and argued that the evidence failed to show that the two defendants were acting in concert and did not establish who actually shot the victims.

I. DOCKET NO. 311045 (DEFENDANT CRAIG)

Defendant Craig's sole claim on appeal is that defense counsel was constitutionally ineffective for agreeing to proceed with one jury. Defendant Craig maintains that he and codefendant Young presented antagonistic and mutually exclusive defenses and that separate juries were therefore necessary to protect his right to a fair trial. Because defendant Craig failed to raise this issue in a motion for a new trial or request an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review of this issue is limited to mistakes apparent from the record. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

Whether a defendant received the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *Id.*

To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and resulting prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Specifically, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and, but for counsel's error, the result of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 670. This Court will not substitute its own judgment for that of counsel on matters of trial strategy, nor will it "use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

The proceedings against defendant Craig were initiated before charges were brought against codefendant Young. Defendant Craig was bound over for trial in October 2011, approximately two months before defendant Young's preliminary examination. In January 2012,

the trial court denied a motion by the prosecutor to consolidate the two cases for trial because defendant Craig's trial was already scheduled and would have to be adjourned if the two cases were consolidated. However, when defendant Craig's trial was subsequently adjourned for other reasons, the court agreed to consolidate the two cases. It was not until three days before trial began on April 16, 2012, that the trial court was first presented with defendant Craig's motion for a separate jury. The court agreed to allow separate juries only after both defense attorneys indicated that their clients might testify, with it stating, "That will solve the problem with an abundance of caution." On the morning of trial, however, both defense attorneys advised the court that they were willing to proceed with one jury.

On motion of a defendant, severance is mandatory under MCR 6.121(C) if "severance is necessary to avoid prejudice to substantial rights of the defendant." But under MCR 6.121(D), on motion of any party, severance is discretionary if "severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants." The trial court's decision in this case indicates that it was making a discretionary decision. We are not persuaded that defense counsel's decision to acquiesce to a single jury fell below an objective standard of reasonableness, especially considering that the original basis for the request (i.e., that both defendants may testify) did not occur. Rather, both defendants waived their right to testify.

We disagree with defendant Craig's argument on appeal that separate juries were necessary to ensure fairness because he and defendant Young were presenting mutually exclusive, antagonistic defenses. Under *People v Hana*, 447 Mich 325, 350; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994), "mere finger pointing does not suffice" to establish a right to a separate jury or trial. It is not enough that a codefendant may testify as a witness because a fair trial does not include the right to exclude relevant and competent evidence. *Id.* Further, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' and 'irreconcilable.'" *Id.* at 349. Defenses are mutually exclusive within this standard if the jury would have to believe the core of evidence offered by one defendant at the expense of the other defendant's core evidence. *Id.* at 349-350.

Where, as in this case, multiple defendants are charged under an aiding and abetting theory, the risk of prejudice arising from a joint trial is reduced. *Id.* at 360. As the *Hana* Court observed:

> Finger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses. The properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal. [*Id.* at 360-361.]

Aiding and abetting is merely a prosecution theory that allows for imposition of vicarious liability on an accomplice. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). A defendant is liable for crimes he intends to aid or abet, and the natural and probable consequences of those crimes. *Id.* at 14-15. The elements of aiding and abetting are:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).]

Considering that the prosecution intended to present an aiding and abetting theory of liability at trial with respect to both defendants, defendant Craig's counsel's had no reason to believe that severance was mandatory. The vague finger-pointing arguments made by the defense attorneys at the pretrial hearing regarding who fired gunshots were inadequate to mandate severance. Even with the benefit of hindsight, defendant Craig has not established that he and defendant Young presented mutually exclusive or irreconcilable defenses that necessitated separate trials or separate juries. Neither defendant presented evidence that disputed their presence during the shooting. Both defendants defended by arguing that they were not engaged in concerted action to shoot anyone and that the prosecution failed to provide sufficient detail regarding how the shooting occurred to find guilt beyond a reasonable doubt.

Furthermore, regardless of whether the respective defense theories could be considered mutually exclusive and irreconcilable, when considering defense counsel's decision to proceed with one jury, we must affirmatively entertain the range of possible reasons for counsel proceeding as he did. *Vaughn*, 491 Mich at 670. Counsel reasonably could have concluded that a single jury would provide an opportunity for the jury to blame defendant Young for the shooting of Turner and Richardson. Cf. *Graves v State*, 272 Ga App 178, 180; 612 SE2d 37 (2005) (noting that it can be a strategic choice not to seek severance, for the purpose of giving the jury an opportunity to solely blame the codefendant). Defendant Craig has not overcome the presumption of sound strategy.

Accordingly, we reject defendant Craig's claim that defense counsel was ineffective for agreeing to proceed with one jury.

II. DOCKET NO. 310435 (DEFENDANT YOUNG)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Young argues that the prosecution failed to present sufficient evidence to support his convictions. He contends that there was no credible and reliable evidence to support a finding that he killed Turner, shot and wounded Richardson, or aided and abetted another in doing so. We disagree.

When considering a challenge to the sufficiency of evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *Robinson*, 475 Mich at 5. Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of a crime. *Unger*, 278 Mich App at 223. "This Court will not

interfere with the trier of fact's role in determining the weight of the evidence and the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

To establish defendant Young's guilt as an aider and abettor, the prosecutor was required to prove that someone committed the crimes charged, that defendant Young performed acts or provided encouragement that assisted the commission of the crimes; and that defendant Young intended to commit the crimes or knew that the principal intended to commit them while giving aid and encouragement. *Moore*, 470 Mich at 67-68. A person who aids or abets is also liable for all crimes that are a natural and probable consequence of the commission of an intended offense. *Robinson*, 475 Mich at 15.

Three crimes were charged in this case. A conviction for first-degree premeditated murder requires evidence that the victim was intentionally killed, and that the killing was premeditated and deliberate. *Unger*, 278 Mich App at 223, 229. The requisite intent may be inferred from any facts in evidence, including the circumstances surrounding a killing. *Id.* at 223, 229. A conviction for assault with intent to commit murder requires "proof of an assault, committed with an actual intent to kill, which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 155; 703 NW2d 230 (2005). A conviction for felony-firearm requires proof that a person carried or possessed a firearm during the commission or attempt to commit a felony. MCL 750.227b(1); see also *Moore*, 470 Mich at 67. The prosecutor, however, is not required to prove that the firearm was operable. *People v Peals*, 476 Mich 636, 656; 720 NW2d 196 (2006).

Viewed in a light most favorable to the prosecution, the evidence established that multiple gunshots were fired after Richardson saw defendant Young point a revolver at Turner's face and pull the trigger. Witnesses testified that both defendant Young and codefendant Craig were armed with guns. Ingram testified that she heard "a lot of gunshots." Richardson testified that he heard 15 to 17 gunshots. Sydes testified that she heard one gunshot followed by another "set" of two or three gunshots. Turner sustained three gunshot wounds. All of these events occurred outside Richardson's drug house, after Richardson, accompanied by Turner, had been confronted by defendant Craig, a rival seller of drugs.

The evidence supported an inference that defendant Young and codefendant Craig were acting in concert outside of Richardson's drug house. Regardless of whether defendant Young was able to fire his revolver after Richardson and Turner fled, the jury could find that defendant Young's act of pointing the revolver at Turner's face and pulling the trigger was the impetus for the shooting. Aiding and abetting encompasses "assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite that crime." *Moore*, 470 Mich at 63. Considering both the direct and circumstantial evidence regarding defendant Young's involvement, the evidence was sufficient to sustain each of his convictions.

B. DEFENDANT YOUNG'S STANDARD 4 BRIEF

Defendant Young raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues has merit.

1. UNDISCLOSED WITNESSES

Defendant Young argues that the prosecution violated its duty of disclosure under MCL 767.40a by failing to disclose the names of two allegedly exculpatory res gestae witnesses, Ronell Williams and Demond Washington, on its witness list filed before trial. Because defendant Young did not raise this issue in the trial court, it is unpreserved. Accordingly, defendant Young has the burden of establishing "(1) that [an] error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Vaughn*, 491 Mich at 664-665, citing *Carines*, 460 Mich at 763. The record does not support this claim of error. The record contains a three-page witness list dated December 20, 2011, that lists both Williams and Washington. Accordingly, there is no plain error.

2. PLEA OFFER

Defendant Young next argues that he was denied the effective assistance of counsel because he rejected the prosecutor's pretrial plea offer in reliance on defense counsel's representation that he and codefendant Craig would have separate juries. Defendant Young stated at the *Ginther* hearing that he was under the impression that, if there were two juries, codefendant Craig would have testified before Young's jury and claimed sole responsibility for the charged crimes. Consequently, defendant Young averred that counsel failing to properly advise him on the matter and failing to ensure two juries resulted in him rejecting the prosecution's plea offer.

Pursuant to *Lafler v Cooper*, 566 US ___ ; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012), a defendant's right to the effective assistance of counsel extends to the plea-bargaining process. To establish ineffective assistance of counsel, the defendant must show that the outcome of the plea process would have been different had he been competently advised by counsel. *Id.*, 132 S Ct at 1384. Counsel must provide sufficient assistance to enable the defendant to make an informed and voluntary decision between tendering a plea or going to trial. *People v Douglas*, 296 Mich App 186, 206; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012); *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). But without evidence that counsel gave incorrect or inadequate advice, a defendant cannot establish that counsel's performance was deficient. *Burt v Titlow*, ___ US ___; 134 S Ct 10, 17; 187 L Ed 2d 348 (2013).

Defendant Young and trial counsel presented conflicting testimony on this issue at the *Ginther* hearing. Defense counsel flatly denied that the discussions regarding the prosecution's plea offers involved any consideration of whether defendant Young and codefendant Craig would have separate juries, and counsel further denied ever representing to defendant Young that there would be separate juries. According to defense counsel, defendant Young's decision whether to accept or reject the prosecution's plea offer hinged on whether a particular prosecution witness was going to testify at trial, and once defendant Young learned that the witness would not be testifying, he was insistent upon going to trial. Conversely, defendant Young testified that he rejected the prosecutor's plea offer because he was assured by defense counsel that he and codefendant Craig would have separate juries, which would allow codefendant Craig to testify before defendant Young's jury that defendant Young was not involved in the shooting. Defendant Young testified that if he had known there would only be one jury, he would have accepted the prosecution's plea offer.

The trial court found it unnecessary to resolve these conflicting accounts in deciding defendant Young's ineffective assistance of counsel claim. Instead, it simply ruled that defense counsel was not ineffective because the use of a single jury at trial was based solely on the trial court's decision to proceed with one jury, and not on any request or acquiescence by defense counsel. The trial court's resolution of this issue reflects a misunderstanding of the nature of defendant Young's ineffective assistance of counsel claim. The claim did not depend solely on whether counsel performed deficiently by failing to secure separate juries, which the trial court found was not the case. Rather, resolution of the claim depended on whether defense counsel provided sufficient advice to enable defendant Young to make an informed and voluntary decision whether to accept the plea offer or proceed to trial. Despite the trial court's apparent misunderstanding of the nature of defendant Young's claim, we conclude that the record does not support defendant Young's claim that defense counsel was ineffective.

First, defendant Young has not established factual support for his claim that he reasonably believed that codefendant Craig intended to provide favorable testimony if defendant Young had a separate jury. Although defendant Young testified at the *Ginther* hearing that codefendant Craig "was going to testify on my behalf if we had the separate jury saying that I wasn't at the scene" and defendant Young asserts in his brief that codefendant Craig intended to testify that only codefendant Craig was guilty, defendant Young never presented any testimony or affidavit from codefendant Craig in support of these claims. Further, these claims are inconsistent with the positions actually taken by codefendant Craig at trial, at his sentencing, and on appeal. Second, defendant Young testified at the *Ginther* hearing that the trial court ruled several months before trial, in December 2011 or January 2012, that separate juries would be allowed. There is no evidence of any such ruling by the trial court at that time. Rather, the record indicates that the court first addressed the issue of separate juries at the pretrial hearing on April 13, 2012, which was only four days before trial. Third, the record discloses that defense counsel announced on the record at the April 13 pretrial hearing that defendant Young had rejected the prosecutor's plea offers *before* defense counsel first orally moved for separate juries. The fact that the trial court made its pretrial ruling allowing separate juries *after* the plea discussions ended belies any claim by defendant Young that his decision to reject the plea offers was premised on a belief that he and codefendant Craig would have separate juries. Fourth, a need for separate juries to enable codefendant Craig to testify before defendant Young's jury was never mentioned as one of the justifications for separate juries when this issue was argued before the trial court. Fifth, defendant Young was present when both defense attorneys announced on the record on the first day of trial that they were willing to proceed with only one jury. Despite defendant Young's present contention that the availability of separate juries was the principal factor in his decision to proceed to trial, he never expressed any disagreement or opposition to defense counsel's statement. Sixth, after the prosecution rested, codefendant Craig, followed by defendant Young, both announced on the record that they were waiving their right to testify. During this exchange, defendant Young, with knowledge that codefendant Craig had elected not to testify, also expressed satisfaction with defense counsel's services.

Considering all of these circumstances, we conclude that the record does not factually support defendant Young's claim that his decision to reject the prosecutor's plea offer was based either on incorrect advice by defense counsel, or an expectation that he would have a separate jury before which defendant Craig intended to provide exculpatory testimony. Accordingly, we reject this claim of ineffective assistance of counsel.

3. PROSECUTORIAL MISCONDUCT

Defendant Young next argues that misconduct by the prosecutor during opening statement and closing arguments denied him a fair trial. We disagree.

When issues of prosecutorial misconduct are preserved, appellate review is de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). But because defendant Young did not object to any of the challenged conduct, these claims are unpreserved and review is limited to plain error affecting defendant Young's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). As such, reversal is only warranted if prejudice from the misconduct could not have been alleviated by a curative instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). When reviewing a prosecutor's remarks, we must examine the entire record and evaluate the challenged remarks in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

Defendant Young first argues that the prosecutor infringed on his right to wear civilian clothing at trial by commenting in opening statement and closing argument that his requests in recorded telephone calls for someone to bring him "school clothing" to wear at trial demonstrated his intent to create a false impression of himself to deceive the jury. Defendant Young correctly observes that an accused is entitled to wear civilian clothing rather than prison clothing at trial. *People v Lewis*, 160 Mich App 20, 30; 408 NW2d 94 (1987). But the accused is denied due process only where his or her clothing can be said to impair the presumption of innocence. *Id.* at 30-31. As explained in *Estelle v Williams*, 425 US 501, 504; 96 S Ct 1691; 48 L Ed 2d 126 (1976), compelling an accused to wear jail clothing presents an unacceptable risk of impairing the presumption of innocence because it is a "constant remainder of the accused's condition implicit in such distinctive, identifiable attire." In this case, defendant Young's claim of due process error fails because it is not predicated on any governmental compulsion or even defendant Young's actual attire at trial. Importantly, the prosecutor did not argue that there was anything wrong or deceptive about wearing ordinary civilian clothing. The prosecutor, instead, argued that defendant Young's *specific* request for "school clothing" was intended to create a false impression of himself in order to deceive the jury into thinking that he was a student.

Considered in context, we cannot conclude that these comments deprived defendant Young of a fair trial. The prosecutor was not commenting on defendant Young's right to wear ordinary civilian clothing at trial. Regardless, because a curative instruction would have alleviated any prejudice, defendant is not entitled to any relief. Further, because we conclude that the comments were permissible, defense counsel's decision to not object was not objectively unreasonable. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Defendant Young next argues that the prosecutor improperly vouched for Richardson's credibility by commenting that Richardson was telling the truth about what happened to him. A prosecutor may not vouch for the credibility of a witness by suggesting that she has special knowledge of the witness's credibility. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). But a prosecutor may argue from the evidence that a witness should be believed. *Id.*; *Dobek*, 274 Mich App at 66. Examined in context, it is apparent that the prosecutor's argument that Richardson was telling the truth was based on the evidence. Thus, there was no misconduct.

Accordingly, defense counsel's failure to object to the remarks also was not improper. *Horn*, 279 Mich App at 39-40.

Defendant Young also argues that the prosecutor engaged in misconduct by arguing facts not of record with respect to his height. A prosecutor may not make a factual statement that is unsupported by the evidence. *Dobek*, 274 Mich App at 66. But a prosecutor is generally free to argue the evidence and all reasonable inferences arising from the evidence as it relates to the prosecutor's theory of the case. *Unger*, 278 Mich App at 236; *Dobek*, 274 Mich App at 66. Examined in context, it is apparent that the prosecutor was recounting a witness as testifying, "I can tell you that he is dark. He is thin. And he is about 5'8" or he's taller than me." We disagree with defendant Young's contention that the "taller than me" statement was a reference to the prosecutor's height. The statement was used by a witness when comparing the gunman's height to her own. At most, the prosecutor's reference to the gunman being "about 5'8"" constituted a misstatement of the witness's testimony, which, in actually, provided that the gunman was a "[d]ark male, taller than me. I'm 5'5" so [he's] taller than me and slender." This isolated comment did not deprive defendant Young of a fair trial. Further, the trial court instructed the jury that the "[l]awyer's statements and arguments are not evidence" and "[y]ou should only accept the things the lawyers say supported by the evidence or your own common sense and general knowledge" "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. To the extent that the prosecutor misstated the evidence, the trial court's instructions were sufficient to protect defendant Young's substantial rights. For this same reason, there is no reasonable probability that the result of the trial would have been different if defense counsel had objected to the prosecutor's remark. Accordingly, defendant's related ineffective assistance of counsel claim also fails.

Defendant Young also argues that the prosecutor made an improper appeal to the jury's civic duty when commenting on a witness's fears and motive to testify. We disagree. "It is improper for a prosecutor to appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment." *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004). A prosecutor may not resort to a civic duty argument that appeals to the fears and prejudices of the jury. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). But a prosecutor may fairly respond to issues raised by the defendant, *Brown*, 279 Mich App at 135, and "[o]therwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel," *Dobek*, 274 Mich App at 64.

Examined in context, it is apparent that the prosecutor's rebuttal argument that the witness "left here defiant about being afraid to live on her block" and was motivated to testify in order to make "her block safe" was responsive to defense counsel's argument that the witness might be protecting a cousin and protecting her own life because she still sees Richardson coming and going from a house on her street. Considering the responsive nature of the remarks and their focus on the witness's motives, there was no improper appeal to the jury's civic duty. Thus, defendant Young has failed to establish any plain error. And because the prosecutor did not make an improper civic duty argument, any objection on this basis would have been futile. Thus, defense counsel was not ineffective for failing to object. *Horn*, 279 Mich App at 39-40.

Lastly, because defendant Young has not established any actual instances of prosecutorial misconduct that had the cumulative effect of depriving him of a fair trial, he is not entitled to relief under a cumulative-error theory. *Bahoda*, 448 Mich at 292 n 64; *Unger*, 278 Mich App at 261.

4. FELONIOUS ASSAULT

Defendant Young also argues that defense counsel was ineffective for conceding in closing argument that he was guilty of the lesser crime of felonious assault. "[I]t is only a complete concession of a defendant's guilt that constitutes ineffective assistance of counsel." *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). This Court "will not second-guess trial counsel's strategy of conceding certain elements of the charge at trial." *People v Chapo*, 283 Mich App 360, 369-370; 770 NW2d 68 (2009). It is permissible for trial counsel to concede guilt to a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

In her closing argument, defense counsel asserted that Richardson was not a reliable witness, but she also argued that even if the jury believed his testimony, defendant Young's act of simply pointing a gun at Turner only constituted a felonious assault. Examined as whole, defense counsel neither conceded defendant Young's guilt to any of the charged offenses or his identity as a participant in the shooting. Therefore, we find no basis for defendant Young's claim of ineffective assistance of counsel.

We also reject defendant Young's additional argument that defense counsel was ineffective for not requesting a jury instruction on felonious assault. MCL 768.32 only permits instruction on necessarily included lesser offenses to a charge. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). "A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed with the elements necessary for the commission of the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). A felonious assault requires that an assault be committed with a dangerous weapon. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). The use of a dangerous weapon is not an element of any of defendant Young's charged offenses. Because defendant Young was not legally entitled to a jury instruction on felonious assault, defense counsel was not ineffective for failing to request the instruction. Counsel is not required to make futile requests at trial. See *Horn*, 279 Mich App at 39-40.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio